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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 177

OLIVER ROSENBERG, STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners,

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

MEMORANDUM OF RESPONDENT, MARIE MINICHIELLO, INDIVIDUALLY AND AS EXECUTRIX, IN LIEU OF BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Marie Minichiello, individually
and as executrix.

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No. 1461

OLIVER ROSENBERG, STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

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v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

Memorandum in Lieu of Brief

We do not wish to burden this Court with repetitious argument. We concur in the brief of respondent, Elwin W. Stevens (on behalf of his son, Dennis J. Stevens, and individually), in opposition to the petition for a writ of certiorari filed by Attorney Irving I. Waxman. We merely add that the petition for a writ of certiorari should be denied for want of a substantial federal question. See *Hanover Insurance Co. v. Victor,* 393 U. S. 7.

Wright on Federal Courts, 4108, at page 431, says:

> "Denial of certiorari, as has frequently been explained, imports nothing as to the merits of the case. All it means is that, for whatever reason, there were not four members of the Court who wished to hear the case. *Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.*"

Under the *Seider* doctrine a plaintiff may obtain *quasi-in-rem* jurisdiction over a non-resident defendant by attaching the obligation of the defendant's insurer to defend and indemnify the defendant under a liability insurance policy if the insurer is subject to jurisdiction in New York. This created quite a stir which awakened legal theorists and writers as to probable consequences under various circumstances, and has shaken our jurisprudence in the area of *in rem* jurisdiction.

In *Simpson v. Loehmann,* 21 N. Y. 2d 305, (1967), at pages 311 and 312, the New York Court of Appeals stated:

> "The historical limitations on both *in personam* and *in rem* jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, *e.g.,* International Shoe Co. v. Washington, 66 S. Ct. 154, 326 U. S. 310, 90 L. Ed. 95, 161 A. L. R. 1057; McGee v. International Life Ins. Co., 78 S. Ct. 199, 355 U. S. 220, 2 L. Ed. 2d 223; Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 21 A. D. 2d 474, 15 N. Y. 2d 443, 251 N. Y. S. 3d 740.) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power." . . .
>
> "Almost half a century ago, Chief Judge Cardozo began his famous article, '*A Ministry of Justice*' (35

> Harv. L. Rev. 113), with the statement that 'The courts are not helped as they could and ought to be in the adaptation of law to justice'. Some time thereafter, the New York Legislature created a Law Revision Commission and, more recently, the State's Judicial Conference appointed an Advisory Committee on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the bases for *in personam* jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of *in rem* jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances, it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship *inter se*, of *in rem* jurisdiction, *in personam* jurisdiction and *forum non conveniens*. Absent new data suggesting the desirability of a departure from the general principles underlying *in rem* jurisdiction, as reflected in *Seider*, we find neither basis nor justification for departing from our holding in that case."

In February, 1968, the federal court, Southern District of New York, in *Podolsky v. Devinney*, 281 F. Supp. 1968, held the *Seider* doctrine unconstitutional, that the compulsion of submitting to personal jurisdiction or risking a default amounted to deprivation of property without due process of law.

In April, 1968, in a memorandum decision denying a motion for reargument in the case of *Simpson v. Loehmann*, 21 N. Y. 2d 990, the New York Court of Appeals responded to the constitutional challenge of the no-limited-appearance-rule, as applied to a *Seider*-situation, and held that

the recovery in this sort of case would be limited to the face value of the attached insurance policy.

We wish to point out that the New York Legislature in its 1969 Session approved the proposal of the Judicial Conference and amended the Civil Practice Law and Rules by incorporating in Subdivision (c) of Rule 320 of the CPLR a provision for a limited appearance in attachment-based cases. Now, by this amendment, in cases where jurisdiction is based solely on a levy on defendant's property within the state pursuant to an order of attachment, defendant's appearance is not equivalent to *in personam* jurisdiction.

Respectfully submitted,

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